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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JANICE A. GAINES,

Plaintiff and Appellant,

v.

RONALD HUBBARD et al.,

Defendants and Respondents.

2d Civil No. B213873  
(Super. Ct. No. 56-2008-00323598-CU-  
BC-VTA)  
(Ventura County)

Plaintiff Janice A. Gaines appeals from an order granting a motion to quash service of summons filed by defendants Ronald and Rhea Hubbard. On appeal, plaintiff argues the evidence establishes that defendants consented to California jurisdiction and had sufficient minimum contacts with California to support the court's exercise of personal jurisdiction over them. We disagree and affirm.

*STATEMENT OF FACTS AND PROCEDURAL HISTORY*

Respondents Ronald Hubbard and Rhea Hubbard (the Hubbards) are residents of Hawaii. In 2007, they sold *Haiku*, a 44.5-foot sailing vessel, to California resident, appellant Janice Gaines. Although *Haiku* was located in Hawaii, the Hubbards offered it for sale through a non-exclusive listing contract with Charlotte Schmidt Yacht Sales (Schmidt) located in Oxnard. Gaines traveled to Hawaii to take possession of

*Haiku* in July 2007 and set sail for Costa Rica. Approximately 400 miles off the coast of Honolulu, *Haiku*'s main mast cracked and broke free causing substantial damage to the yacht.

On July 25, 2008, Gaines filed an unverified complaint for negligence, breach of written agreement, breach of fiduciary duty, fraudulent concealment of material facts, and negligent concealment of material facts against the Hubbards and Schmidt.<sup>1</sup> The complaint alleges the Hubbards knew the mast was defective and failed to disclose the defect to Gaines before she purchased *Haiku*. The Hubbards were served with summons in Hawaii.

With respect to jurisdiction, the complaint alleges that the Hubbards "purposefully avail[ed] themselves of the privilege of conducting business, sale, and purchase activities of *Haiku* in . . . California. Hubbards contracted Schmidt['s] licensed brokerage company to seek California residents as potential buyers of *Haiku*."

On October 6, 2008, the Hubbards filed a motion to quash summons for lack of personal jurisdiction. In declarations attached to the motion, the Hubbards state they are residents of Hawaii, all contacts between them and Gaines took place in Hawaii, they have no office, no license or registration to do business, no employer or employees, no agent for service of process, and no bank accounts or tax obligations in California. The Hubbards contend the only connection between them and California is the non-exclusive sales agreement between them and Schmidt, and that their engagement of an independent contractor in California is insufficient to justify a California court's exercise of jurisdiction over them.

Gaines filed opposition to the motion, including her declaration which states (1) the Hubbards were long-term residents of California before moving to Hawaii in 2006 and members of their immediate family remain in California, (2) *Haiku* was manufactured in California in 1985, (3) the Hubbards moored *Haiku* in California after they purchased it, (4) the Hubbards did a survey in San Diego and an out-of-water

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<sup>1</sup> Schmidt is not a party to this appeal.

inspection of *Haiku* in Ventura County after they purchased it, (5) the purchase and sale agreement contains an arbitration clause with California as the forum state, (6) the Hubbards discovered that the mast was defective while *Haiku* was moored in California, (7) Schmidt is a licensed California broker and is not licensed in Hawaii, (8) Schmidt was the Hubbards' authorized agent in California, (9) Schmidt was the Hubbards' broker when they purchased *Haiku* in 2005, (10) the agency agreement between Schmidt and the Hubbards contains an arbitration clause naming California as the forum state, and (11) the contract negotiations involving purchase of *Haiku* took place in California.

At the hearing on the motion to quash on December 17, 2008, Gaines requested that the court continue the hearing so that she could conduct discovery. The court denied the request for continuance and granted the motion to quash. The court reasoned: "[I]n situations such as this where there is a world market for a unique item of personalty, to compel the Hubbards to litigate a claim in the broker/buyer's jurisdiction does not comport with 'traditional notions of fair play and substantial justice.' In making this determination, the 'court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.' [Citation.]

"The Hubbards concede the availability of Hawaii as a viable forum. The Hubbards are in Hawaii. 'Haiku' is in Hawaii. P[aintiff] knew the boat was in Hawaii when the transaction was consummated. . . . [I]t is not an unfair burden to require P[aintiff] to return to Hawaii to litigate any defects.

"Motion to quash granted. The irony is, of course, that the parties apparently have the power to petition for arbitration under the purchase-and-sale agreement; which arbitration must be conducted in Oxnard, CA per its terms if

requested."<sup>2</sup> Immediately following the court's order quashing service, Gaines filed a motion to compel arbitration.

On February 5, 2010, Gaines filed an appeal from the order quashing service of summons. On the same day, Gaines's motion to compel arbitration was heard. In a tentative ruling, the court granted the motion to compel as to the Hubbards and denied it as to Schmidt. However, the court changed its mind. Its order of February 9, 2009, states: "[T]he Court finds as follows: (a) there is no contract between plaintiff Janice A. Gaines and defendants Charlotte Schmidt and Charlotte Schmidt Yacht Sales committing these 'Schmidt' defendants to arbitration; and (b) because the Court has already found that defendants Ronald Hubbard and Rhea Hubbard had insufficient contacts with the State of California to constitutionally justify *in personam* jurisdiction over said defendants, it is likewise without jurisdiction to order these 'Hubbard' defendants to arbitration. Therefore, the interests of justice are best served by the denial of plaintiff's motion and petition." The record does not contain a notice of appeal from the order denying Gaines's motion to compel arbitration.

### *DISCUSSION*

#### *Standard of Review and Burden of Proof*

"Where the evidence of jurisdictional facts is not in conflict, we independently review the trial court's decision. [Citation.] To the extent there are conflicts in the evidence, we must resolve them in favor of the prevailing party and the trial court's order." (*Malone v. Equitas Reinsurance Ltd.* (2000) 84 Cal.App.4th 1430, 1436.) We review the trial court's resolution of factual conflicts under the substantial evidence standard. (*People v. Mickey* (1991) 54 Cal.3d 612, 649; *Integral Development Corp. v. Weissenbach* (2002) 99 Cal.App.4th 576, 585.) Under this standard, "the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact." (*Grainger v. Antoyan* (1957) 48 Cal.2d 805, 807.) "[S]ubstantial evidence' is . . .

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<sup>2</sup> The trial court's ruling includes this haiku: "with the failing boom/tropical sun falls starboard/blue suit emerges."

evidence . . . 'of ponderable legal significance, . . . reasonable in nature, credible, and of solid value.' [Citations.]" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873, italics omitted.) Such evidence may be in the form of declarations. (*Atkins, Kroll & Co. v. Broadway Lumber Co.* (1963) 222 Cal.App.2d 646, 654.) If supported by substantial evidence, the trial court's resolution of conflict will not be disturbed on appeal. (*Kroopf v. Guffey* (1986) 183 Cal.App.3d 1351, 1356.)

"[T]he plaintiff has the initial burden of demonstrating facts justifying the exercise of jurisdiction.' [Citation.] If the plaintiff meets this initial burden, then the defendant has the burden of demonstrating 'that the exercise of jurisdiction would be unreasonable.'" (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 273; see *In re Automobile Antitrust Cases I and II* (2005) 135 Cal.App.4th 100, 110 [plaintiff must do more than merely allege jurisdictional facts --it must present evidence sufficient to justify a finding that California may properly exercise jurisdiction over the defendant].)

#### *The Trial Court Did Not Err in Quashing Service of Summons*

California courts may exercise jurisdiction on any basis that is not inconsistent with the state and federal Constitutions. (Code Civ. Proc., § 410.10;<sup>3</sup> *Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1061.) By imposing only these constitutional limitations, our Legislature has authorized the broadest possible exercise of jurisdiction. (*Sibley v. Superior Court* (1976) 16 Cal.3d 442, 445.) California may assert personal jurisdiction over a nonresident in a variety of circumstances, including consent and minimum contacts.

#### *Minimum Contacts*

A court may exercise personal jurisdiction if the defendant has enough minimum contacts with the state so that "' . . . "traditional notions of fair play and substantial justice" . . ."' are not offended. (*Anglo Irish Bank Corp., PLC v. Superior Court* (2008) 165 Cal.App.4th 969, 977.)

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<sup>3</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

There are two types of personal jurisdiction, general and specific. General jurisdiction, that is, "jurisdiction on any cause of action," is appropriate where the "defendant . . . has substantial, continuous, and systematic contacts with the forum state" that do not have to be specifically related to the cause of action being asserted. (*Anglo Irish Bank Corp., PLC v. Superior Court, supra*, 165 Cal.App.4th at p. 978.) Specific personal jurisdiction is constitutionally asserted if the defendant established minimum contacts with the state such that "the assertion of jurisdiction does not violate "traditional notions of fair play and substantial justice."" (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444-445.) Under the minimum contacts analysis, the defendant's "conduct and connection" with the forum must be such that it should "reasonably anticipate" being haled into court there. (*Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 474.)

Gaines asserts that the minimum contacts test is met because the Hubbards authorized Schmidt to act as their agent in California to market and sell *Haiku*, and the acts of the agent can be imputed to the nonresident party where, as here, the litigation involves an intentional tort. She relies on *Anglo Irish Bank Corp., PLC v. Superior Court, supra*, 165 Cal.App.4th 969, *Magnecomp Corp. v. Athene Co.* (1989) 209 Cal.App.3d 526, 535-536, and *Northern Natural Gas Co. v. Superior Court* (1976) 64 Cal.App.3d 983, 995. These cases are inapposite as they all involve the issue of whether a nonresident corporation is subject to jurisdiction of the California courts through the contacts of its agents, employees or subsidiary corporations. As explained in *Magnecomp* at page 535: "Since corporations by their nature can only operate through their appointed agents, courts consistently exercise personal jurisdiction over corporations based on their agents' activities within the forum state." The instant matter does not involve a corporation. Gaines has not cited a case in which this principle has been applied to noncorporate defendants.

Even if we were to apply the agency theory to individuals, Gaines's evidence was insufficient to sustain her burden. Agency is established when the evidence demonstrates that the alleged principal had the right to control the activities of the alleged

agent. "Right to control" means exercise of a highly pervasive degree over the resident agent. "It must veer into management and day-to-day operations of the local subsidiary . . . ." (*In re Automobile Antitrust Cases I and II*, *supra*, 135 Cal.App.4th at p. 120.) The Hubbards' nonexclusive listing of *Haiku* with Schmidt does not meet this test and Gaines has offered no other evidence pertinent to this issue.

The other two cases cited by Gaines, *Kaiser Aetna v. Deal* (1978) 86 Cal.App.3d 896, 901, and *Burger King Corp. v. Rudzewicz*, *supra*, 471 U.S. at page 476, also do not support her position. In fact, both cases state principles contrary to Gaines's arguments. In *Kaiser Aetna*, the court held California did not have personal jurisdiction over 21 nonresident individual defendants because they had committed no tortious act in California and "'personal jurisdiction over any non-resident individual must be premised upon forum-related acts personally committed by the individual.'" (At p. 901; accord, *In re Automobile Antitrust Cases I and II*, *supra*, 135 Cal.App.4th at p. 113.) Gaines's reliance on *Burger King* is similarly misplaced. In that case, the court held personal jurisdiction over a franchisee was established by the franchisee's substantial and continuous contacts with the forum state. There is no evidence that the Hubbards have such contacts with California. Moreover, *Burger King*, at page 478, expressly rejected an argument similar to that Gaines makes here, holding that a contract alone does not automatically provide the required minimum contacts for the exercise of personal jurisdiction. (See also *Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at p. 449 [same].) "Rather, a court must evaluate the contract terms and the surrounding circumstances to determine whether the defendant purposefully established minimum contacts within the forum. Relevant factors include prior negotiations, contemplated future consequences, the parties' course of dealings, and the contract's choice-of-law provision. [Citation.]" (*Goehring v. Superior Court* (1998) 62 Cal.App.4th 894, 907.)

A contract having a "substantial connection" to the forum state might be sufficient to assert jurisdiction if the suit is based on that contract. (*Safe-Lab, Inc. v. Weinberger* (1987) 193 Cal.App.3d 1050, 1053-1054.) In evaluating the sufficiency of a contract in establishing minimum contacts, we evaluate factors such as "prior

negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing . . . ." (*Burger King Corp. v. Rudzewicz*, *supra*, 471 U.S. at p. 479.) Here, the Hubbards' declarations establish that they negotiated for the sale of *Haiku* solely from their home in Hawaii and that performance of the contractual obligations, by both parties, occurred in Hawaii. Therefore, these contracts lack a "substantial connection" with California and are insufficient to establish "conduct and connection" with the forum such that the Hubbards "' . . . should reasonably anticipate being haled into court there.'" (*Id.* at p. 474.)

Gaines also argues that her complaint alleges intentional torts directed and causing harm to a resident of California. An intentional tort could sufficiently establish minimum contacts with the forum. (*Calder v. Jones* (1984) 465 U.S. 783.) However, merely asserting the Hubbards knew or should have known that their intentional acts would cause harm in the forum state is not enough to establish jurisdiction. Rather, "'additional evidence of express aiming or intentional targeting'" is required to establish jurisdiction. (*DVI, Inc. v. Superior Court* (2002) 104 Cal.App.4th 1080, 1098-1099.) The Hubbards' declarations support the conclusion that the contractual relationship that is the subject of the lawsuit was performed and the injury occurred outside California. Giving a California broker a non-exclusive listing to sell *Haiku* in California is not sufficient to establish minimum contacts, and Gaines has produced no other relevant evidence supporting her argument. (See *Nobel Farms, Inc. v. Pasero* (2003) 106 Cal.App.4th 654, 661 [purported partnership relationship between a resident and nonresident insufficient because jurisdiction over each defendant must be established individually].)

The only instances where a California court has power to exercise jurisdiction over a nonresident defendant if the defendant commits an act or omission outside the forum state is when the defendant acted with the intent to cause a tortious effect within the state or where the defendant could reasonably be expected to cause effects within the forum state. (*Kaiser Aetna v. Deal*, *supra*, 86 Cal.App.3d at pp. 902-903.) The record contains no admissible evidence in this regard. (See *Pavlovich v.*



*Superior Court, supra*, 29 Cal.4th at pp. 270-271 ["merely asserting that a defendant knew or should have known that his intentional acts would cause harm in the forum state is not enough to establish jurisdiction . . . . Instead, the plaintiff must also 'point to contacts which demonstrated that the defendant *expressly aimed* its tortious conduct at the forum . . . ."]; see also *Hill v. Noble Drilling Corp.* (1976) 61 Cal.App.3d 258, 263 [mere fact an out-of-state tort affected a Californian is not enough to enable a court to hold the tort had an effect in California].) As discussed above, merely engaging a California broker and selling property to a California resident is not sufficient to invoke the jurisdiction of a California court. (See *Wolfe v. City of Alexandria* (1990) 217 Cal.App.3d 541, 547 ["the fact that a defendant's actions in some way set into motion events which ultimately injured a California resident," cannot, by itself, support the assertion of jurisdiction over the defendant].)

Because we have concluded that Gaines has not provided sufficient evidence of minimum contacts, we need not address whether exercise of California jurisdiction meets the fairness test. (See *Sibley v. Superior Court, supra*, 16 Cal.3d at p. 448 [when insufficient showing of minimum contacts is made, it is not necessary to undertake the additional process of balancing the conveniences of litigating in a particular forum].) Moreover, the trial court's ruling in this respect is based on substantial evidence and is binding on this court. (See *Anglo Irish Bank Corp., PLC v. Superior Court, supra*, 165 Cal.App.4th at p. 980 [when the evidence is conflicting, an appellate court will not set aside the trial court's factual determinations if they are supported by substantial evidence].)<sup>4</sup>

*The Trial Court Did Not Err in Denying Gaines's Request for a Continuance*

At the hearing on the motion to quash, Gaines for the first time requested a continuance to conduct discovery. The court denied the motion on the ground that

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<sup>4</sup> Gaines belatedly presents a lengthy argument for the first time on appeal that the forum selection clause in the agreement represents the Hubbards' consent to exercise of personal jurisdiction by the California courts. We do not consider a theory raised for the first time on appeal. (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316.) Gaines raised the issue of consent in her motion to compel arbitration; however, no appeal was taken from that order and it is not before us.

counsel provided no statutory or case law authority to support the request. The trial court did not err in denying the request.

Generally, a plaintiff may conduct discovery as to jurisdiction before the court rules on a motion to quash. (*Goehring v. Superior Court*, *supra*, 62 Cal.App.4th at p. 911.) But the grant or denial of a motion to continue for purposes of engaging in discovery is within the trial court's discretion. (*Ibid.*) "[T]o prevail on a motion for a continuance for jurisdictional discovery, the plaintiff should demonstrate that discovery is likely to lead to the production of evidence of facts establishing jurisdiction." (*In re Automobile Antitrust Cases I and II*, *supra*, 135 Cal.App.4th at p. 127.)

The trial court found, and the record demonstrates, that plaintiff made no such showing. In her opposition to the motion, plaintiff did not request a continuance or even mention discovery. At the hearing on the motion, Gaines offered no explanation how a continuance would lead to facts justifying the court's personal jurisdiction over the Hubbards. It was within the court's discretion to deny a continuance when nothing was presented to support that request. (See, e.g., *Thomson v. Anderson* (2003) 113 Cal.App.4th 258, 271 [denial of discovery not abuse of discretion where the first mention of discovery was at the hearing on the motion to quash and there was no explanation of the type of desired discovery or the anticipated outcome]; see also *Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 486-487 [denial of continuance for discovery not error because plaintiff did not suggest that discovery was likely to produce evidence of additional California contacts by the defendant].)

The order is affirmed. Respondents shall recover costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Glen Reiser, Judge  
Superior Court County of Ventura

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